

DIANA CLARICE CHAN CHIING HWA*a***v.****TIONG CHIONG HOO**

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

SITI NORMA YAAKOB JCA

MOKHTAR SIDIN JCA

[CIVIL APPEAL NO: Q-02-165-2000 & Q-02-195-2000]

24 OCTOBER 2001

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CIVIL PROCEDURE: *Jurisdiction - Maintenance claim - Whether High Court had jurisdiction to entertain application for maintenance - Law Reform (Marriage and Divorce) Act 1976, ss. 77(1)(a), 106*

FAMILY LAW: *Children - Custody - Principles in granting custody - Welfare of children - Law Reform (Marriage and Divorce) Act 1976, s. 88(2)*

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These were appeals by both parties against the trial judge's decision dismissing: (1) the wife's application for custody of their four children, a monthly maintenance of RM50,000 for herself, and an additional monthly maintenance of RM50,000 for all the four children once custody has been given to her; and (2) the husband's application seeking custody of all four children. The trial judge had ruled that he had no jurisdiction to entertain the wife's application for maintenance under s. 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'); regarding the matter of custody, since the affidavits conflict each other on all material particulars, the trial judge had held that the disputed question of custody be ventilated at the hearing of the petition for divorce.

*e**f***Held:****Per Siti Norma Yaakob JCA***g*

[1] The trial judge had erred when he ruled that he had no jurisdiction to entertain the wife's application for maintenance. Any step taken by a party under the Act as a prelude to bringing the marriage to an end is sufficient to put s. 77(1)(a) of the Act into motion. In this instance, since the wife had filed a reconciliation application under s. 106 of the Act, a mandatory requirement for any person seeking to put an end to the marriage, the High Court had the necessary jurisdiction under s. 77(1)(a) of the Act. (p 725 f-h)

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- a* [2] The trial judge should have sieved through the conflicting affidavit evidence advanced by both parties, considered only those that were undisputed or uncontroverted, and balanced these with the consideration of what would work towards the betterment and interests of the four children. In this regard, he is reminded to act according to the provisions of s. 88(2) of the Act. Since he had omitted to do so, the matter of custody is remitted to him for a rehearing together with the pending divorce petition that has since been filed by the wife in the High Court. (p 727 b-c)
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- c* [Wife's appeal partially allowed; husband's appeal dismissed; custody matter remitted to High Court for rehearing; interim orders on custody and maintenance; the four children to remain where they are; wife and eldest daughter to receive monthly maintenance of RM25,000.]

[Bahasa Malaysia Translation Of Headnotes]

- d* Ini merupakan rayuan-rayuan oleh kedua-dua pihak terhadap keputusan hakim perbicaraan yang menolak: (1) permohonan isteri untuk penjagaan keempat orang anak mereka, nafkah bulanan sebanyak RM50,000 untuk dirinya, dan nafkah bulanan tambahan sebanyak RM50,000 untuk kesemua empat orang anak tersebut sebaik sahaja penjagaan diberikan kepada beliau; dan (2)
- e* permohonan suami yang memohon hak penjagaan kesemua empat orang anak tersebut. Hakim perbicaraan telah memutuskan bahawa beliau tidak mempunyai bidangkuasa untuk melayan permohonan si isteri untuk mendapatkan nafkah di bawah s. 77(1)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'); berhubung hal perkara penjagaan, oleh
- f* kerana afidavit-afidavit bercanggahan dengan satu dengan yang lain berhubung dengan butir-butir penting, hakim perbicaraan telah memutuskan bahawa persoalan penjagaan yang dipertikaikan disuarakan di perbicaraan petisyen untuk perceraian.

Diputuskan:

- g* **Oleh Siti Norma Yaakob HMR**

- h* [1] Hakim perbicaraan telah tersalah ketika beliau memutuskan bahawa beliau tiada bidangkuasa untuk melayan permohonan si isteri untuk mendapatkan nafkah. Sebarang langkah yang diambil oleh sesuatu pihak di bawah Akta tersebut sebagai suatu usaha pendahuluan untuk menamatkan perkahwinan tersebut adalah memadai untuk mengusulkan s. 77(1)(a) Akta tersebut. Dalam keadaan ini, oleh kerana si isteri telah memfailkan satu permohonan perdamaian di bawah s. 106 Akta tersebut, satu syarat mandatori untuk mana-mana orang yang memohon untuk menamatkan perkahwinan tersebut, Mahkamah Tinggi mempunyai bidangkuasa yang perlu di bawah
- i* s. 77(1)(a) Akta tersebut.

[2] Hakim perbicaraan sepatutnya telah menapis keterangan afidavit bercanggahan yang telah dikemukakan oleh kedua-dua pihak, pertimbangkan hanya keterangan-keterangan yang tidak dipertikaikan atau yang tidak berkontroversi, kemudian mengimbangkannya dengan pertimbangan mengenai apa yang boleh dilakukan demi kebaikan dan kepentingan empat orang anak tersebut. Berhubung dengan perkara ini, beliau diingatkan supaya bertindak mengikut peruntukan-peruntukan s. 88(2) Akta tersebut. Oleh kerana beliau telah gagal untuk melakukan sedemikian, perkara penjagaan diremitkan kepada beliau untuk suatu perbicaraan semula bersama-sama dengan petisyen perceraian yang menanti penyelesaian yang telah sejak itu difailkan oleh si isteri di dalam Mahkamah Tinggi. a
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[Rayuan si isteri dibenarkan sebahagiannya; rayuan si suami ditolak; perkara penjagaan diremitkan kepada Mahkamah Tinggi untuk perbicaraan semula; perintah-perintah interim mengenai penjagaan dan nafkah; keempat-empat anak tersebut kekal di mana mereka berada; isteri dan anak perempuan sulung akan menerima nafkah bulanan sebanyak RM25,000.] d

Legislation refererd to:

Law Reform (Marriage and Divorce) Act 1976, ss. 77(1)(a), 88(2), 106
Married Women and Children (Maintenance) Act 1950, ss. 3(2), 9

(Q-02-165-2000)

*For the appellant - SS Muker (Fabian AH Lim); M/s Stephen Robert & Wong
For the respondent - YN Foo (Stephen Chang & Faridah Abdullah); M/s Lim & Lim*

(Q-02-195-2000)

*For the appellant - YN Foo (Stephen Chang & Faridah Abdullah); M/s Lim & Lim
For the respondent - SS Muker (Fabian AH Lim); M/s Stephen Robert & Wong* e
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[Appeal from High Court, Sib; Originating Summons No: 24-212-1999]

Reported by Suresh Nathan

JUDGMENT

Siti Norma Yaakob JCA:

These two appeals were heard together as they stem from the same matrimonial proceedings commenced by the wife, the appellant in Civil Appeal Q-02-165-2000, against the husband, the appellant in Civil Appeal Q-02-195-2000. g
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The parties were married on 29 August 1986, and cohabited at No. 70, Brooke Drive, Sib, the matrimonial home. They have four children namely:

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- a* (1) Stefany Valerie Tiong Phong (f) (“Stefany”) born on 6 June 1987.
(2) Kenneth Tiong Yung Yee (“Kenneth”) born on 1 May 1988.
(3) Clara Tiong Siew Ee (f) (“Clara”) born on 8 March 1991 and
- b* (4) Kelvin Tiong Yung Yiing (“Kelvin”) born on 30 November 1992.
- As at the hearing of these appeals before us, the four children were aged 13, 12, 9 and 8 respectively.
- c* In February, 1999, the husband left the matrimonial home together with Kenneth, Clara and Kevin (“the three children”) and they took up residence at 17 1/2 Mile, Ulu Oya Road, Sibul, (the farmhouse) together with one Madam Yong and her four children. The wife continued to reside at the matrimonial home together with Stefany.
- d* On 6 September 1999, seven months after the husband moved out of the matrimonial home, the wife commenced proceedings against the husband claiming *inter alia*, the following three reliefs.
- (1) The guardianship, custody, care and control of the four children.
- e* (2) Monthly maintenance of RM50,000 for herself to take effect from 1 January 1998.
- (3) An additional monthly maintainance of RM50,000 for all the four children once custody has been given to her.
- f* Upon the filing of her originating summons, the wife also filed and obtained an *ex parte* order restraining the husband from removing or taking away the four children out of Malaysia.
- Not to be outdone, the husband also filed an application seeking *inter alia*, custody, care and control of all the four children.
- g* The wife’s originating summons and the husband’s application for custody were heard jointly at the end of which Tee Ah Seng, J dismissed both applications and ordered that each party bear its own costs. In considering the wife’s application for maintenance the trial judge ruled that she could not take advantage of s. 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976,
- h* (“the Act”) as the requirement of para. (a) of sub-cl. (1) of that section had not been met. Alternatively he had no jurisdiction to entertain such an application under ss. 3(2), and 9 of the Married Women and Children (Maintenance) Act 1950, as the jurisdiction to hear such application is vested only to the Magistrates or Sessions Courts.
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As for the issue of who should get the guardianship, custody, care and control of the four children, since the affidavits affirmed by both parties conflict each other on all material particulars, the trial judge held that the disputed question of custody be ventilated at the hearing of the petition for divorce. He also took into consideration of the fact that the wife took no positive step to obtain custody after the husband left the matrimonial home but was content to let seven months pass by before filing the originating summons. This delay, he contended, worked against the wife's interests.

It is not disputed that at the hearings of the two applications in the court below, no divorce proceedings had been commenced by any of the parties, although the wife had already taken the necessary step of filing a reconciliation application with the registrar of marriages at Sibu District, Sibu, in accordance with s. 106 of the Act as a prelude to the filing of a divorce petition. It is this absence of a pending divorce petition that had influenced the trial judge to rule that the wife had failed to satisfy the provisions of s. 77(1)(a) of the Act, under which her application for maintenance is made. Section 77(1)(a) in its entirety reads as follows:

77. Power for court to order maintenance of spouse

(1) The court may order a man to pay maintenance to his wife or former wife

(a) during the course of any matrimonial proceedings;

We say that the trial judge had erred when he ruled that he had no jurisdiction to entertain the wife's application for maintenance under the above section. This is so as we acknowledge the Act to be a piece of social legislation for which a liberal interpretation is more apt than a strict one. As such matrimonial proceedings need not necessarily commence with the filing of a petition for divorce, legal separation or nullity of marriage. Any step taken by a party under the Act as a prelude to bringing the marriage to an end is sufficient enough to put s. 77(1)(a) into motion. In this instance, the wife had filed a s. 106 reconciliation application to a conciliatory body at the material time, a mandatory requirement for any person seeking to put an end to the marriage and we have since been informed at the hearing of these appeals that a petition for divorce had already been filed by the wife in the High Court at Sibu and registered as Divorce Petition No. 33-16-2000. We say that on the facts of this case, the High Court had the necessary jurisdiction to entertain the wife's application for maintenance under s. 77(1)(a).

As for the issue of the custody of the four children of the marriage, whilst we appreciate that the six affidavits filed by the wife conflict with the seven filed by the husband, this should not have deterred the trial judge from making

a a decision, *albeit* an interim one, on this contentious matter as the relevant consideration in law is the paramount interest and welfare of the children of the marriage. It is to be expected that in a highly contentious custody matter like the one before us, both sides are bound to paint the worst imaginable image of the other so that custody is denied to the guilty party.

b On behalf of the wife it was argued in the court below that the husband is not a fit and proper parent to be granted custody of the four children based on the following main factors.

c (1) That the husband has an adulterous relationship with Madam Yong who also resides at the farmhouse together with him, the three children and her own four children. As such the environment to which the three children is exposed to is not conducive for their healthy and proper upbringing.

d (2) As the Managing Director of a public listed company and a Director of 26 other companies, the husband has to entertain and travel extensively and this leaves him with little or no time to tend to the care and upbringing of the three children. Invariably that responsibility will pass on to the Indonesian maids, employed by him.

e (3) That the husband had tried all means to sever the wife's ties with the three children by denying her access to them.

The picture of the wife as painted by the husband can be summed up as follows.

f (1) That she is very possessive, bossy, selfish and bad tempered and these had led to frequent quarrels and tension in the matrimonial home.

g (2) With her bad temper she became abusive to the children and had threatened to kill them. She had beaten Kenneth for being slow in his studies, Clara for calling her a monster and Stefany for being slow on the piano.

h Allegations and counter allegations of other forms of improper behaviour made by one party against the other abound in the 13 affidavits filed in support or in opposition to the applications for custody. They are all aimed at showing either party to be the guilty party and therefore not the fit and proper parent to have the custody of the four children. Needless to say the affidavit evidence alone, conflicting as they are, cannot form the basis of deciding the truth of the matters complained of in the absence of any cross examination of the makers of the affidavits. However above and beyond that there is the paramount interest and welfare of the children to be considered and it is the

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omission on the part of the trial judge to consider this aspect of the law that compelled us to disturb and reverse his finding of indefinitely putting off the determination of the disputed custody matter until the hearing of the divorce petition between the parties.

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Faced with such conflicting affidavit evidence what the trial judge should have done was to seive through such evidence, consider only those that are undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children. In this regard he is reminded of the provisions of s. 88(2) of the Act and to act accordingly. Since he had omitted to do so we remitted the matter of custody to him for a rehearing together with the pending Divorce Petition No. 33-16-2000 and to that extent, we allowed the wife's appeal, Q-02-165-2000, set aside the order dismissing the wife's originating summons, and restored it to the file.

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Likewise since we have ruled that the trial judge has the necessary jurisdiction to entertain the wife's application for maintenance under s. 77(1)(a) of the Act the issue of the wife's maintenance is also to be reheard together with the divorce petition with costs pertaining to the wife's appeal to follow the event of the rehearing. Consequently we also ordered that the husband's appeal, Q-02-195-2000, be dismissed with costs to follow the event of the rehearing of his application for custody. The deposits made by the parties in both appeals are to be refunded to them.

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Pending the rehearing, we had also made some interim orders on maintenance and custody.

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Dealing with the matter of custody and considering the best interest, welfare and happiness of the four children we are of the opinion that the *status quo* be maintained and the three children continue to reside with their father and Stefany with her mother. Stefany has been separated from her siblings for more than 15 months and although this is not a desirable situation, that can, for some measure, be overcome by an order of access when all the four children can be together. Removing the three children from their present environment may create negative effects on them. With the passing of time, they have adjusted themselves to the pain of separation from their mother and sister. Returning them to their mother may be traumatic as that will revive past unpleasantness and create new ones. They have settled in their new school, a move that was strongly objected to by the wife and a change of residence may well prompt the wife to relocate them at their original school. There is no evidence that the husband had behaved less than a loving and caring parent to them or that they have not adjusted to their present surroundings and a life style that is dictated by him. The threat that Madam Yong might not be

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- a* a good influence on them has since been removed as she no longer lives with them at the farmhouse. In the light of the matrimonial difficulties faced by their parents, and the fact that the four children are in no position to express their choice we consider that it would be more in their welfare and interests that they remain where they are, Stefany with their mother and her three
- b* siblings with their father until the final custody order is made at the hearing of the divorce petition. In the meantime we allowed the wife to have access to the three children during the week ends from 5pm on Fridays until 8pm on Sundays and in the execution of that access order, the husband shall deliver and collect the three children from the matrimonial home.
- c* In the course of writing this judgment we realise that we had overlooked the fact that the husband should also have been allowed access to Stefany. As our custody order is subject to review, perhaps the access order in favour of the wife be amended to take effect every other week end so that on the week end the wife has no access to the three children, the husband can have access
- d* to Stefany by her spending the week end with her father and her siblings at the farmhouse on terms similar to the access order that has been granted to the wife with the difference that when Stefany joins her father and siblings, the wife shall deliver her and collect her from the farmhouse.
- e* It is not disputed that the husband had not been maintaining the wife since 1 June 1999, and she is claiming RM50,000 per month so that she is restored to the style of life that she was accustomed to. She contends that the amount would not be a financial burden to the husband as he is a multi-millionaire with large share holdings in a family company and at least 28 other companies and substantial investments in the property market. She estimated his taxable
- f* income for the year 1999 to be approximately RM1.2 million and non-taxable income at RM1.4 million. With all the income and benefits due to him, the husband had been giving her RM22,000 as her personal monthly expenses and the use of credit card facilities to the credit of RM30,000 per month. Additionally he paid for the children's tuition fees, the salaries of the maids,
- g* drivers and cook, household expenses and the medical and dental bills. She estimated that his monthly income from salaries, directors' fees, dividends and other benefits to be in the region of RM220,000.
- h* Whilst the husband denies the extent of his financial standing, as averred to by the wife, the fact still remains that he is not a struggling wage earner as he could afford lavish overseas holidays for the family and was generous towards the wife.

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The wife is an advocate and solicitor and presently works as a legal adviser to a group of companies known as Rimbunan Hijau for which she is paid a monthly salary of RM3,500. We feel that the figure of RM50,000 asked for by the wife to be on the high side, and she must realise that she too has a price to pay for the breakdown of the marriage. However bearing in mind the generous life style that she was used to, we consider that a monthly sum of RM25,000 for her and Stefany would be sufficient to maintain both of them and the husband shall commence paying such monthly maintenance from 1 July 2000. There is also the period of one year preceding this for which the husband had failed to maintain both the wife and Stefany and we accordingly ordered that the husband pay all arrears due for that one year within 90 days from 13 June 2000, the day we made the maintenance order.

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